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IN THE

Supreme Court of the United States

CITY OF NEW YORK, JASON TURNER, individually and in his capacity as Commissioner of New York City Human Resources Administration, GEORGE SANTIAGO, in his individual capacity,

Petitioners,

—v.—

UNITED STATES OF AMERICA, NORMA COLON, MARIA E. GONZALEZ, TAMMY AUER, THERESA CALDWELL-BENJAMIN,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENT TAMMY AUER'S BRIEF IN OPPOSITION

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January 5, 2005

QUESTIONS PRESENTED

Title VII of the Civil Rights Act of 1964 authorizes employees to sue their employers for sexual and racial discrimination and harassment in the workplace. The questions presented are:

1) Whether workers in New York City's work experience program established under the 1996 welfare reform law can qualify as "employees" under the common law agency principles that govern employee status under Title VII.

2) Whether Title VII was impliedly preempted by the non-discrimination provision in the 1996 welfare reform law.

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STATEMENT OF THE CASE

A. Nature of the Case

The respondents are suing the City of New York (the "City") under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq., the federal law that prohibits employment discrimination on the basis of race, sex, religion or national origin. The four individual respondents allege that they were sexually or racially harassed in violation of Title VII while working for the City in exchange for their welfare benefits in a work experience program established by the City under the 1996 federal welfare reform law. The City moved under Fed. R. Civ. P. 12 (b)(6) to dismiss respondents' claims, contending that respondents are not covered by Title VII. It now challenges an interlocutory decision by the court of appeals vacating the district court's dismissal. The City petitions for review of the interlocutory holding that a work experience program worker can qualify as an "employee" under the Title VII employee standard, an issue that no other federal court of appeals has addressed. The City also petitions for review of the interlocutory holding that Title VII was not impliedly preempted by the non-discrimination provision in the 1996 welfare law, likewise an issue that no other court of appeals has addressed.

B. PRWORA – The 1996 Welfare Reform Law

The Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA), Pub. L. No. 104-193, 110 Stat. 2105 (1996), ended the previous program for assisting needy families, Aid to Families With Dependent Children, and authorized the new work-focused Temporary Assistance to Needy

Families (TANF) program, codified at 42 U.S.C. § 601 et seq. PRWORA requires states to ensure that certain percentages of TANF families participate in "work activities." 42 U.S.C. § 607(a). PRWORA specifies twelve permissible work activities, 42 U.S.C. §§ 607(d)(1)-(d)(12), Petitioners' Appendix ("Pet. App.") A155, including "work experience . . . if sufficient private sector employment is not available," 42 U.S.C. § 607(d)(4), Pet. App. A155. When an individual refuses to participate in a work activity, PRWORA requires the state to "(A) reduce the amount of assistance otherwise payable to the family pro rata (or more, at the option of the State) . . . ; or (B) terminate such assistance." 42 U.S.C. § 607(e)(1), Pet. App. A156.

C. The New York City Work Experience Program

In New York State, the PRWORA program is operated by local social services districts, one of which is New York City, subject to rules set by state statute and regulation. In 1997, New York State enacted a welfare reform law to implement PRWORA, 1997 N.Y. Laws, ch. 436, authorizing the creation of programs of "work experience in the public sector or non-profit sector ... if sufficient private sector employment is not available." N.Y. Soc. Serv. Law § 336(1)(d), Pet. App. A254. In response to this state statute, New York City created the Work Experience Program (WEP) at issue in this case. Under the state law, the City must calculate the maximum required number of hours of WEP work by dividing the recipient's welfare grant by the applicable minimum wage. N.Y. Soc. Serv. Law § 336-c(2)(b), Pet. App. A259. WEP workers must be "provided appropriate workers' compensation or equivalent protection for on-the-job injuries and tort claims protection on the same basis, but not necessarily at the same benefit level, as they

are provided to other persons in the same or similar positions," and "the project to which the participant is assigned [must be one that] serves a useful public purpose." N.Y. Soc. Serv. Law §§ 336-c(2)(c)&(d), Pet. App. A260. WEP workers must also be reimbursed for their authorized child care and transportation expenses. N.Y. Soc. Serv. Law § 332-a, Pet. App. A236. A recipient who refuses to work incurs a pro rata reduction of her household's grant, *i.e.*, if the refusing recipient is a single parent with one child, the household's grant is cut in half. N.Y. Soc. Serv. Law § 342, Pet. App. A273-74.

D. Respondent Tammy Auer

In 1997, the New York City welfare agency assigned respondent Tammy Auer to perform general office work at the New York City Sanitation Department. As summarized by the court of appeals, her complaint alleges that she was sexually harassed by her Sanitation Department supervisor over the period of approximately eighteen months that she worked for the department, with the harassment including repeated sexually charged comments and invitations and inappropriate touching. Pet. App. A7-8. Ms. Auer filed a complaint with the Equal Employment Opportunity Commission (EEOC), which, after finding reasonable cause to believe her allegations were true, referred her charge to the United States Department of Justice. *Id.* at A8.

E. District Court Proceedings

In May 2001, the United States brought a lawsuit against New York City alleging violations of Title VII, acting on behalf of Tammy Auer, Maria Gonzalez, Theresa Caldwell-Benjamin, and a fourth WEP worker who subsequently settled her claims and is no longer a

party to the action. Each of these women moved to intervene in the government's lawsuit. Respondent Auer's motion was granted with respect to her Title VII claim on July 23, 2004. *See* Rec. Doc. 39 at 2. In September 2001, Norma Colon, also a WEP worker, filed a separate lawsuit against the City alleging violations of Title VII.

The City moved to dismiss both lawsuits pursuant to Rules (12)(b)(1) and (12)(b)(6) of the Federal Rules of Civil Procedure. The City argued that WEP workers cannot be employees within the meaning of Title VII because they are not remunerated for their work, and that, assuming that WEP workers could satisfy the Title VII employee standard, PRWORA had impliedly preempted Title VII from applying to PRWORA work experience workers. The district court consolidated the lawsuits for the purpose of hearing and deciding the motions to dismiss. The district court assumed that jurisdiction existed and resolved the consolidated motions under Rule 12(b)(6). In an unpublished opinion and order dated March 8, 2002, Pet. App. A55, the district court granted the dismissal motions, holding that WEP workers cannot be employees under Title VII because they are not remunerated for their work. The district court did not reach the question of whether PRWORA had preempted Title VII.

F. Court of Appeals Proceedings

On February 13, 2004, the Second Circuit Court of Appeals vacated the district court's judgment and remanded the case for further proceedings with one judge dissenting. Pet. App. A1-52.

Concerning the Title VII employee standard, the court of appeals explained that under Second Circuit precedent, employee status is determined by a two-part test. *Id.* at A15. First, the putative employee must establish that she received remuneration from the putative employer in some form for her work, which need not be a salary but must consist of "substantial benefits not merely incidental to the activity performed." *Id.* (quoting *York v. Ass'n of the Bar*, 286 F.3d 122, 126 (2d Cir.), *cert. denied*, 537 U.S. 1089 (2002)). Second, if the putative employee establishes receipt of remuneration, employee status is then determined by applying the common law of agency factors articulated by this Court in *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 751-52 (1989). *Id.*

The court of appeals held that the district court had erred by finding as a matter of law that the plaintiff WEP workers were not remunerated for their work. *Id.* at A4. The court of appeals reasoned that plaintiffs' allegations of the receipt of benefits for their work including their cash assistance, their eligibility for workers' compensation, and their reimbursement for child care and transportation expenses would, if true, suffice to establish remuneration. *Id.* at A16. The court of appeals also noted that its conclusion was supported by the EEOC's interpretation of Title VII. *Id.* at A17-18.

Concerning PRWORA preemption, the court of appeals concluded that the City had not demonstrated the clear expression of congressional intent to preempt Title VII that is required to establish that one federal statute has impliedly preempted another. *Id.* at A35. The court of appeals rejected several arguments in support of preemption that the petitioners no longer advance, as well as the "expressio unius est exclusio alterius" argument

that the City renews here. *Id.* at A27-31. The court of appeals noted that its conclusion was supported by the federal agencies' interpretations of PRWORA and by PRWORA's legislative history. *Id.* at A31-35.

ARGUMENT

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED

None of the usual criteria that this Court applies in determining whether to exercise its certiorari jurisdiction favors review of the decision below. First, the case is in an interlocutory posture. Second, the alleged conflicts with other court decisions asserted by petitioners do not exist. Third, the City advances no compelling reason for granting certiorari. Fourth, review by this Court might have no prospective effect as Congress has not yet decided whether and in what form the TANF program at issue in this case will continue beyond March 31, 2005. Moreover, the court of appeals decision was correct.

I. None of the Usual Criteria That This Court Applies in Determining Whether to Exercise its Certiorari Jurisdiction Favors Review of the Decision Below

A. Review would be premature because the decision below is interlocutory

The court of appeals decision is interlocutory in nature. This Court has repeatedly stated that it "generally await[s] final judgment in the lower courts before exercising [its] certiorari jurisdiction," even where the court of appeals has resolved the merits of the case and only the "determination of an appropriate remedy" remains. *Virginia Military Inst. v. United States*, 508 U.S.

946 (1993) (Scalia, J., respecting the denial of the petition for writ of certiorari); *see also, e.g.*, *Brotherhood of Locomotive Firemen & Enginemen v. Bangor & Aroostook R.R.*, 389 U.S. 327, 328 (1967) (denying certiorari "because the Court of Appeals remanded the case" making it "not yet ripe for review by this Court.")

The decision below is not interlocutory in a merely technical sense. The court of appeals reviewed the district court's dismissal of the case "accepting all of the plaintiff's allegations as true and drawing all inferences in a manner favorable to the plaintiff," Pet. App. A14, and held only that "the allegations of plaintiffs' complaints sufficiently pleaded the individual plaintiffs' status as employees entitled to Title VII's protection." *Id.* at A36. On remand, the final results of the case might effectively moot the issues on which the City seeks review if the respondents are unable to prove their allegations, or if the City successfully advances other defenses that would preclude respondents from obtaining relief.

B. The alleged conflicts with other court decisions asserted by petitioners do not exist

1. The court of appeals decision does not conflict with the decision of another federal court of appeals on the same matter

This Court may grant certiorari when a court of appeals decision is "in conflict with the decision of another United States court of appeals on the same important matter." Sup. Ct. R. 10(a). In their "Question Presented," petitioners assert a conflict with two other federal court of appeals decisions, *O'Connor v. Davis*, 126 F.3d 112 (2d Cir. 1997), *cert. denied*, 522 U.S. 1114 (1998), and *Johns v. Stewart*, 57 F.3d 1544 (10th Cir.

1995). However, these cases did not involve the applicability of Title VII to work experience workers, and consequently did not decide the "same important matter." Moreover, *O'Connor* was, like the instant case, a Second Circuit decision, not the decision of "another" court of appeals, and this Court does not grant certiorari to resolve alleged intracircuit conflicts. *See Davis v. United States*, 417 U.S. 333, 340 (1974). Furthermore, both *O'Connor* and *Johns* are also otherwise distinguishable.

In *O'Connor*, a college student performed field work at a psychiatric hospital and received federal work study funding from the college she attended but no payments from the hospital. 126 F.3d at 113. She sued the hospital, the state that operated the hospital, and her hospital supervisor, who allegedly had sexually harassed her. *Id.* at 114. The Second Circuit held that the student did not qualify as a Title VII employee because she received no remuneration from the putative employer, the psychiatric hospital. *Id.* at 116. In contrast, in this case, as the court of appeals noted, Pet. App. A22, New York City -- the putative employer -- is both the payor and the recipient of the WEP workers' services, and thus the rationale of *O'Connor* does not apply.

In *Johns*, two welfare recipients who had participated in the work component of a Utah public assistance program sued the state welfare agency. They asserted that they had been required to work more than the number of hours determined by dividing their grant by the minimum wage in alleged violation of the requirements of the Fair Labor Standards Act (FLSA). *Johns*, 57 F.3d at 1551. The Tenth Circuit held that the plaintiffs were not protected by the FLSA because they were not "employees" within the meaning of the FLSA. In reaching this conclusion, the court of appeals applied

an "economic reality" test that focused "upon the circumstances of the whole activity." *Id.* at 1558-59 (citation omitted). The court of appeals reasoned that work was but "one component" of Utah's comprehensive public assistance plan, and that the overall relationship between the recipients and the welfare agency was an assistance relationship, not an employment relationship. *Id.* at 1559. (Notably, even the work component included not only community work, but also adult education and skills training. *Id.* at 1550.)

Johns is clearly distinguishable from the instant case. First, it did not involve Title VII. Second, the Utah work program antedated PRWORA and was not governed by PRWORA. *Cf. Frank v. United States*, 506 U.S. 932 (1992) (Stevens, J., respecting the denial of certiorari) ("[T]he Court's action is supported by the fact that a square conflict between two Courts of Appeals has not arisen since the enactment of the 1984 statute, and by the Court's normal practice of awaiting such a conflict before considering the significance of new federal legislation.") Third, even as to the FLSA, *Johns* predated the United States Department of Labor (DOL) Guide, issued following enactment of PRWORA, which states that the FLSA can apply to workers in welfare work programs, the first known DOL statement on this matter (discussed *infra* at p. 19). The *Johns* court might have reached a different result if it had been aware of the DOL interpretation. Fourth, the Tenth Circuit applied the "economic reality" test to determine FLSA employee status, not the common law agency test that determines employee status under Title VII.

Respondent is not aware of any other pending litigation raising the questions presented for review. Thus, there is no need for this Court to grant certiorari to

secure uniformity among the decisions of the courts of appeals. Indeed, the grant of certiorari on a novel issue in the absence of a conflict would deprive the Court of the benefit of a fully ventilated discussion of the issue among the courts of appeals. *See Lackey v. Texas*, 514 U.S. 1045 (1995) (Stevens, J., respecting the denial of certiorari) ("Often a denial of certiorari will permit the state and federal courts to 'serve as laboratories in which the issue receives further study before it is addressed by this Court'") (quoting *McCray v. New York*, 461 U.S. 961, 963 (1983)).

2. The court of appeals did not decide a federal question in a way that conflicts with a decision by a state court of last resort

Another circumstance in which this Court may grant certiorari is when a court of appeals has decided "an important federal question in a way that conflicts with a decision by a state court of last resort." Sup. Ct. R. 10(a). Petitioners assert that the court of appeals decision is inconsistent with the decision by the New York Court of Appeals in *Brukhman v. Giuliani*, 94 N.Y.2d 387 (2000). City's Petition for Certiorari ("Pet.") 23.

Petitioners' contention is entirely unavailing. *Brukhman* did not involve Title VII or *any* federal question, but rather involved only the purely state law issue of whether "the prevailing wage provision of the New York State Constitution" applies to WEP workers. *Id.* at 390. While the New York Court of Appeals held that the prevailing wage provision was inapplicable, its decision involved only this state law question. In addressing this state law question, the *Brukhman* court neither invoked nor applied the common law agency test that determines employee status under Title VII.

Additionally, as the Second Circuit decision below explained in distinguishing *Brukhman*:

> [T]he New York Constitution grants special economic rights to certain classes of workers, *i.e.*, they must receive the prevailing wage in the community for the work they perform if the employer receives a public works contract. Title VII in contrast accords the basic civil right of freedom from discrimination to all employees employed by covered employers. In light of the very different scope of Section 17 [of the State Constitution] and Title VII, it would be foolhardy to assume that the New York Court of Appeals would extend its interpretation of the prevailing wage provision to Title VII.

Pet. App. A21-22.

C. Petitioners do not present any compelling reason for granting certiorari

This Court may also grant certiorari for "compelling reasons" other than those delineated in the Court's rules. Sup. Ct. R. 10. The City contends that the court of appeals decision "has limited the City's ability to conduct the [WEP] program in a manner optimally calculated to serve its intended purpose," Pet. 20, and apparently argues that this alleged result is a compelling reason for granting the petition.

However, the court of appeals decision in no way inappropriately hinders the City's ability to administer the WEP program. The decision holds only that WEP

workers may have a remedy under Title VII for sexual or racial discrimination. To the extent that the result of the decision is to reduce discrimination in the WEP program, this in an appropriate limitation on WEP administration. Indeed, the City acknowledges that discrimination against WEP workers is illegal under a state law provision, and asserts that the "City is strongly committed to enforcing this provision and to preventing discrimination against WEP participants." Pet. 4 n.4. The City offers no reason to conclude that the court of appeals decision will hinder, rather than help, the City in accomplishing its anti-discrimination goals.

In support of its hindrance argument, the City asserts that if WEP workers can be employees within the meaning of Title VII, they can also be employees with a right to unionize under the National Labor Relations Act (NLRA), and that an attempt by WEP workers to unionize "could cripple WEP," Pet. 20, a sweeping assertion for which the City offers no evidence. However, the instant case neither addresses nor decides employee status and the right to unionize under the NLRA. If possible unionization is the City's real concern, the City should wait for a case involving unionization to argue these matters.

D. Review by this Court might have no prospective effect as the federal welfare statute at issue in this case may not continue in its present form beyond March 31, 2005

As enacted by PRWORA, the TANF program was scheduled to expire on September 30, 2002. Over the past two years Congress has considered but not enacted a long-term reauthorization. In lieu of a long-term reauthorization, Congress has enacted eight short-term

extensions of TANF, continuing funding and the authority for program activities without program changes. The latest in this series of short-term extensions, Pub. L. No. 108-308, 118 Stat. 1135 (2004), extends TANF until March 31, 2005.

This Court's rules indicate that this Court grants certiorari to consider "important" questions. Sup. Ct. R. 10. Given the TANF program's uncertain future, a decision by this Court on the matter presented here for review might have only retrospective effect. Consequently, the matter presented for review is not the type of "important" matter that merits review by this Court. *Cf. Murel v. Baltimore City Criminal Ct.*, 407 US 355, 358 (1972) (dismissing certiorari as improvidently granted in view of pending revision of the statute at issue). Furthermore, as it seems highly likely that Congress will resolve TANF's future status before a final judgment in the underlying case as a whole, this Court would be better able to determine the importance of the matter presented for review following final judgment, should petitioners at that time still desire to seek review.

II. The Court of Appeals Decision Was Correct

The City argues that this Court should grant certiorari because the court of appeals decision was erroneous. Pet. 21. However, this Court generally does not grant certiorari just because the decision below may be erroneous. *See, e.g, Ross v. Moffit*, 417 U.S. 600, 616-17 (1974) ("This Court's review . . . is discretionary and depends on numerous factors other than the perceived correctness of the judgment we are asked to review"); *Magnum Import Co. v. Coty*, 262 U.S. 159, 163 (1923) (the jurisdiction of the Supreme Court to review cases by way of certiorari "was not conferred upon this Court

merely to give the defeated party in the Court of Appeals another hearing"). Moreover, the decision below was correct.

A. The court of appeals correctly decided that WEP workers may qualify as employees under Title VII

This Court has repeatedly instructed the lower courts to apply common law agency principles to determine if an individual qualifies as an employee where, as in the case of Title VII, the statute containing the term does not helpfully define it. *Clackamas Gastroenterology Assocs., P. C., v. Wells*, 538 U.S. 440, 444-45 (2003); *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 322-23 (1992); *Community for Creative Non-Violence,* 490 U.S. at 739-40. Under Second Circuit Title VII precedent, before applying the common law agency test, a putative employee must meet a threshold test of receipt of remuneration from the putative employer. If the remuneration test is satisfied, employee status is then determined by applying the common law agency principles. *Compare Pietras v. Bd. of Fire Comm'rs*, 180 F.3d 468, 471, 473 (2d Cir. 1999) (volunteer firefighter who receives no salary but who is entitled to "(1) a retirement pension, (2) life insurance, (3) death benefits, (4) disability insurance, and (5) some medical benefits" may satisfy the remuneration requirement), *with York v. Ass'n of the Bar*, 286 F.3d at 126 (bar association volunteer's receipt of benefits merely incidental to the volunteer activity, such as "clerical support and networking opportunities," does not satisfy the remuneration requirement), *and O'Connor v. Davis*, 126 F.3d 116 (student intern who receives no remuneration from the putative employer does not satisfy the remuneration requirement).

This Court has not addressed the specific issue of whether remuneration is always necessary for employee status, as the Second Circuit has held. However, neither petitioners or respondents herein challenge this principle, and indeed the City focuses on the remuneration issue, seeming to "tacitly concede," as the court of appeals suggests, Pet. App. A16, that the plaintiff WEP workers do otherwise qualify as employees under the common law agency test.

The City contends that the court of appeals misapplied the Second Circuit's remuneration principle. This contention does not merit this Court's consideration. *See* Sup. Ct. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of . . . the misapplication of a properly stated rule of law.") Moreover, the City's contention is incorrect.

The City bases its misapplication argument on the assertion that "[b]enefits that are not contingent upon the performance of work cannot be deemed payment for that work." Pet. 26. However, the court below correctly found that once a TANF recipient is assigned to perform work in the WEP program, the share of the household's cash payment attributable to her *is* contingent on the performance of work. Pet. App. A16 ("A plaintiff who unjustifiably refused to work would lose the portion of the family's grant attributable to her.") The City can not reasonably dispute this fact and at least tacitly concedes it. *See* Pet. 25 ("Refusal to comply with any of these requirements may lead to a reduction or termination of benefits.") The City also implicitly concedes that WEP workers are covered by workers' compensation and are reimbursed for their child care and transportation costs. *See id.* at 26. These conceded forms of remuneration are

exactly what the court of appeals relied on in correctly deciding that the remuneration test was satisfied. Pet. App. A16-17.

Furthermore, as the court of appeals decision explains, the conclusion that WEP workers may qualify as employees is supported by the position of the EEOC, the agency charged with enforcing Title VII. *See* Pet. App. A17-19 (quoting EEOC Notice No. 915.002, *Enforcement Guidance: Application of EEO Laws to Contingent Workers Placed by Temporary Employment Agencies and Other Staffing Firms*, at Q&A No. 5 (Dec. 3, 1997), *available at* http://www.eeoc.gov/policy/docs/conting.html (last visited Nov. 28, 2004); and EEOC Compl. Man. (BNA) § 2-III(A)(1)(a), at 605:0009 (2002)). The EEOC's interpretation is "entitled to respect" to the extent it has the "power to persuade," pursuant to this Court's decision in *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944). *See Robinson v. Shell Oil Co.*, 519 U.S. 337, 346 (1997) (deferring to the EEOC's interpretation of "employee" as including "former employee").

B. The court of appeals correctly decided that PRWORA does not preempt Title VII

The court of appeals correctly rejected the City's arguments that PRWORA preempted Title VII from applying to workers in the WEP program. Pet. App. A26-35. Petitioners no longer advance several arguments in support of preemption that they pressed below, but continue to make an "expressio unius est exclusio alterius" argument in favor of preemption. That argument is that the absence of Title VII in the non-discrimination statutes listed in 42 U.S.C. § 608(d) indicates a congressional intent to preempt Title VII.

42 U.S.C. § 608(d), Pet. App. A174-75, provides under the caption "Nondiscrimination provisions":

> The following provisions of law shall apply to any program or activity which receives funds provided under this part:
>
> (1) the Age Discrimination Act of 1975 (42 U.S.C. 6101 et seq.)
>
> (2) Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794)
>
> (3) The Americans with Disabilities Act of 1990 (42 U.S.C. 12101 et seq.)
>
> (4) Title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d et seq.)

The common link among the four listed statutes is that each prohibits discrimination in activities other than employment in programs or activities that receive federal assistance or, in the case of the Americans with Disabilities Act, that are operated by a public entity. As the court of appeals pointed out, these laws reach programs and activities "like education and vocational training that, due to the absence of an employment relationship, clearly are not subject to Title VII. Title VII, on the other hand, governs employment relationships whether federally funded or not." Pet. App. A27.

The court of appeals reasoned that the expressio unius maxim only applies "when the statute identifies 'a series of two or more terms or things that should be understood to go hand in hand' " (quoting *Chevron U.S.A., Inc., v. Echazabal*, 536 U.S. 73, 81 (2002)), thus raising the inference that a similar unlisted term was deliberately excluded. The court of appeals correctly concluded that the expressio unius maxim does not apply

in this instance because Title VII differs in its applicability from the listed statutes.

The City does not challenge the principle of law stated by the court of appeals that the expressio unius principle applies only when the omitted term goes hand in hand with the listed terms, but rather argues that the court of appeals misapplied the principle. However, as noted above, the asserted misapplication of a rule of law does not support certiorari review.

Moreover, the City is incorrect that the court of appeals misapplied the hand-in-hand principle. The City bases this argument on the fact that, like Title VII, two of the listed statutes have provisions that ban employment discrimination. However, unlike Title VII, but like the other listed statutes, these two statutes also have provisions that ban discrimination in activities other than employment. Section 608(d) thus falls far short of creating a "clearly expressed congressional intention" to preempt Title VII, the preemption standard correctly adopted by the court below. Pet. App. A26 (quoting *Morton v. Mancari,* 417 U.S. 535, 551 (1974)).

Furthermore, as the court of appeals decision explains, the no preemption conclusion is supported by the regulations implementing the PRWORA non-discrimination provision that have been issued pursuant to notice and comment by the two federal agencies responsible for PRWORA administration, DOL and the United States Department of Health and Human Services. *See* Pet. App. A31-35. These regulations deserve deference. As the court of appeals concluded, "[l]egislative regulations issued after notice and comment rulemaking, as these regulations were, are given 'considerable weight'." *Id.* at A32 (quoting *Chevron,*

U.S.A., Inc. v Natural Resources Defense Council, Inc., 467 U.S. 837, 844 (1984)).

Additionally, as the court of appeals decision also explains, Pet. App. A29-31, the no preemption conclusion is supported by PRWORA's legislative history. In May 1997, DOL issued a guide implementing PRWORA indicating that the FLSA and federal anti-discrimination laws "apply to welfare recipients as they apply to other workers. The new welfare law does not exempt welfare recipients from these laws." DOL Guide, *How Workplace Laws Apply to Welfare Recipients*, at Q&A No. 1 (May 1997, revised Feb. 1999), *available at* http://www.dol.gov/asp/w2w/welfare.htm (last visited Nov. 28, 2004). Congress subsequently considered but did not enact a provision specifically designed to override this part of the DOL Guide. Pet. App. A30-31. As the court of appeals stated, the failure of Congress to act when it had knowledge of DOL's interpretation suggests that DOL's interpretation is correct. *Id.* at A31.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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